Read Appeal of Denial of Natural Resources Protection Act Permit for Residential Pier

- Appeal of Richard and Margery Read

Chair, Board of Environmental Protection,
c/o Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

March, 15, 2013

RE: Application, L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N

Dear Chair,

As aggrieved applicants we are seeking an appeal to a licensing decision made by the DEP on 19th FEB. 2013, and ask for an administrative process of appeal.

Please accept the following as the applicant's response to the denial of the application. There were two areas that the DEP found that the applicants, (Doc. Richard and Margery Read and Agent Lawrence Billings, P.E.), failed to demonstrate that the project would not have an unreasonable impact on Significant Wildlife Habitats and practicable alternatives to the project exists in public and private facilities. The first area primarily was in the alternative analysis area and the second in the habitat area.

In the DEP's denial letter dated 19th Feb. 2013 the DEP found that the applicants failed to demonstrate that the current seasonal configuration does not provide adequate boating access. Applicants should have been more specific that the sailboat mentioned in the "ALTERNATIVE ANALYSIS", Sh. 1 of 1, Attachment #2 of applicant's application, that this was not the 12' skiff used at the existing floats but is a 16' sailboat requiring a mooring because it can't reasonable be left at the existing float. (See Exhibit – 1)
Given the fact that the Castine public facility is a launching boat ramp and limited skiff tie ups we still contend that it is unreasonable and impracticle to use this or a private facility over five miles away.

Although the applicants are recreational boaters it has become increasingly difficult to schedule time to use the sailboat on a limited tide timetable, high and low tides are becoming greater, global warming issues, applicant is employed daily during the summer that makes having an all tide access necessary to get a reasonable enjoyment of the boating experience.

The Maine Department of Inland Fisheries and Wildlife (MDIFW) proposed to the applicants an alternative of the 100' fixed pier, ramp and one 4'x 16' float. The applicant originally stated this would only gain them 16' over the existing pier but made a mistake in not considering that 4' of the ramp will always be over the float and considering the walking distance over the Ell Grasses from the end of existing ramp to the bottom of the stairway, EXHIBIT 3, the actual gain on the mudflats is a mere 8'.

A summary of the existing, MDIFW alternative and applicants application is:

1) EXISTING PIER -	150'	(130' of structure and 20' dist. to stairs on bank)
2) MDIFW- ALTERNATIVE -	158'	(16' ramp to stairs, 100' pier, 26' Alum. ramp, 16' float)
3) PROPOSED PIER	239'	(reference, Rev. 1, Dec. 5, 2012 of Sht. 1 of 1, Attch. #5E)

Applicants submit that it is not reasonable to do all this work for a mere 8' gain in pier extension when considering the availability of the boating experience due to water depth at the float. It is my professional opinion, as Agent for the Applicants, that the change in water depth would be extremely negligible over the existing pier system.

The second area dealt with the impacts on the habitat. Referencing the DEP's denial letter, application, L-25839-4P-A-N/L-25839-TW-B-N/L-25839-FS-C-N, dated Feb. 19th 2013, on page 4 of 5, first paragraph,(EXHIBIT – 2) the DEP stated that in the MDIFW alternative proposal "a 100' foot permanent pier, ramp, and one float would "CONSIDERABLY LESSEN THE IMPACT OF THE PROJECT". Applicants agree with this assessment as the proposed pier and ramp directly to the existing stairs is a significant improvement over the existing floats sitting on the mud a portion of every day all summer causing loss of sediments and compaction of fine sediments and benthic infauna because of the hydraulic pumping action caused by the tides. In addition to this the constant foot traffic over the 20 feet from the end of the ramp to the bottom of the existing stairs across the emergent species, eelgrasses and salt marsh, will be eliminated as well as the 4' square platform. (EXHIBIT – 3) In Brian Swan and John Sowles March 2008 "DMR's Guidelines/Recommendations for Piers, Ramps and Floats" The Marine Vegetation emergent species were ranked highest in impacts and recommended that to reduce the impact, "projects should be designed to "bridge those areas" and use pile supports both of which were incorporated in the Read's Pier design. It's easy to conclude that the proposed pier does offer significant improvement over the existing pier system.

The applicants conclude that the denial issue becomes the impact of the addition of just the five floats on the end of the project and their impact versus the significant improvement of the proposed pier as mentioned before.

Referencing page 3 of 5 of the denial letter, (EXHIBIT – 4) in the last paragraph under the heading "5. HABITAT" the MDIFW states that the project would "significantly intrude into Significant Wildlife Habitat" during the winter months when the area is primarily used by wintering waterfowl" yet the MDIFW offered approval of the proposed pier if just five floats were eliminated as an alternative. The applicants have to assume that the permanent pier proposal, forgetting the floats for a moment, offers significant improvement to the resource by eliminating the foot traffic between the existing ramp and stairs, elimination of the 4'x4' platform and significantly minimizing the floats completely resting on the mudflats every 24 hours and the applicants wholeheartedly agree.

Applicants contend that during the late fall, winter and early spring the floats are not in the cove and therefore present no impact to the wintering waterfowl. During the summer months the additional 80' gained with applicants proposal will lessen the compaction of fine sediments and benthic infauna and loss of sediments through hydraulic pumping from floats in the tidal water over the existing floating pier set up.

Reference "Exhibit -5", MDIFW's "TIDAL WADING WATERFOWL HABITAT" and "Exhibit -6", MDIFW's "SHOREBIRD FEEDING HABITAT" the applicants question if the addition of 5 additional floats, 80', would actually "entirely bisect the Significant Wildlife Habitat" as stated in the third line down on page 4 of 5 of the denial letter. (EXHIBIT -2 *) Applicant further questions that" the tidal availability is increased" by having just one float as stated in the same third line down.

(EXHIBIT -2-red line) The applicant would only gain 8' in project length, as stated before, and is insignificant.

The applicants petition the DEP to reconsider reversing their denial by reviewing if the proposed addition of five floats would be likely to cause unreasonable impact on Tidal Waterfowl and Wading Bird Habitat and a Shorebird Feeding Habitat.

Applicant contends:

1) The MDIFW alternative was considered to improve the resource over the existing pier System and not be an unreasonable effect on the resource.
2) The proposed pier does not entirely bisect the resource but only goes less than half way across just one of the fingers in the cove as shown on the MDIFW habitat map, Exhibit 5 & 6.
3) It would be an unreasonable hardship to take their sailboat to a private marina over 5 miles away or to keep it at the public facility in Castine.
4) The proposed 100' pier was acceptable under the MDIFW's alternative offered to the Applicants.

Regards,
Lawrence Billings, P.E.

Lawrence R. Billings

cc: Richard and Margery Read

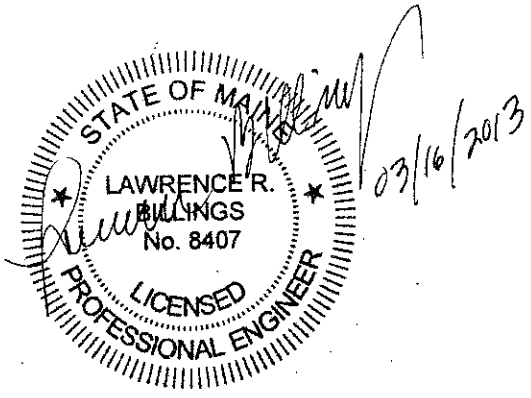

EXHIBIT - 1

ALTERNATIVE ANALYSIS

The proposed project is intended to be a replacement to the existing system of six floats, two 16' ramps and a 3'-6" x 5' wooden post platform system while keeping the floats to enhance the use of the pier over a longer period of tide time. The alternative would still be a local marina. The closest marina is private and up on the Bagaduce River approximately 5 miles away near the Penobscot/Castine town line. The town of Castine has a public boat launch two and half miles away but the applicants maintain their sail boat on a mooring in Hatch cove that makes this alternative also unreasonable.

The proposed design of the pier was done to minimize the resource impact by not extending the proposed pier piles below the Mean Low Water (MLW) and get the extension from the reuse of the six existing floats and adding a 30' ramp. The impact is lessened by moving the six floats 100' further out into the Cove such that they won't be resting on the mud as often as the existing location. Eliminating the 3'-6" x 5' platform and spanning from the proposed pier to the bottom steps of the existing stairs will minimize the impact on the shore line grasses.

Presently, the applicant feels that there is no reasonable alternative to the project to increase the window of opportunity to use their boats from their seaside property because of the lack of a close by public marina.

PURPOSE: To build 100' new pier, install new ramp and add existing 6 floats.

ALTERNATIVE ANALYSIS

DATE: Nov. 12, 2012	**APPLICATION BY:** Larry Billings, P.E.	**APPLICATION FOR:** Richard and Margery Read	**IN:** Hatch Cove
DATUM: MLW = 0.0'	#2 Clam city Blvd.	24 Moore Farm Road	**AT:** Moore Farm Rd.
MHW = 9.8'	Stonington, Maine ,04681	Castine, Maine, 04421	Castine, Maine
			SHEET: 1 of 1 - **Attachment** #2

EXHIBIT – 2

MDIFW stated that the impacts would be considerably lessened if the proposal was for a fixed pier of 4 feet wide by 100 feet long plus one 4-foot by 16-foot seasonal float which would not entirely bisect the Significant Wildlife Habitat and yet would increase tidal availability for the applicants. The Department contacted the applicants to discuss such a potential modification of their proposal. The applicants responded that the fixed pier plus one float configuration was not acceptable for them as it would only provide a 16-foot extension over the length of the existing seasonal float structure.

The Department finds that the applicants have failed to demonstrate that their proposed activity would not unreasonably harm Significant Wildlife Habitat. The Department finds that the proposal would be likely to cause an unreasonable impact on Tidal Waterfowl and Wading Bird Habitat and a Shorebird Feeding Habitat. The Department finds that there are practicable alternatives that would serve the project purpose that would be less damaging to the environment. The proposed project would not unreasonably harm freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.

6. WATER QUALITY:

The applicants propose to use lumber treated with chromated copper arsenate (CCA) to construct the pier. To protect water quality, in a manner that exposes all surfaces to the air for 21 days.

If all CCA treated lumber were adequately cured on dry land prior to the start of construction the Department would not anticipate that the proposed project would violate any state water quality law, including those governing the classification of the State's waters.

BASED on the above findings of fact the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

A. The proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.

B. The proposed activity would not cause unreasonable erosion of soil or sediment.

C. The proposed activity would not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

D. The proposed activity would unreasonably harm a significant wildlife habitat because the project as designed would have an unreasonable impact on significant wildlife habitats and practicable alternatives to the project that would be less damaging to the environment exist. The proposed activity would not unreasonably harm freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.

E. The proposed activity would not unreasonably interfere with the natural flow of any surface or subsurface waters.

EXHIBIT – 3

floats and two ramps to access the water. The current configuration provides partial tide access for the applicants. The application indicates that the applicants' boat is 12 feet long and has a draft of one foot. The applicants did not demonstrate how their current access to the water is impracticable given the size of the boat and stated project purpose. The nearest public facility is 2.5 miles from the project site. The applicants have not demonstrated that the use of the public facility is not a practicable alternative, nor that the use of a private facility located five miles from the property is unreasonable. The applicants did not demonstrate that alternative designs that would have less impact on the significant wildlife habitats present at this location were not practicable.

When impacts to a wetland are proposed, in order to demonstrate that they are not unreasonable impacts, the amount of coastal wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicants have failed to demonstrate that the current seasonal configuration does not provide adequate boating access. As the applicants are recreational boaters, all-tide access is not required for the project. Additionally, the applicants have not demonstrated that a fixed pier plus one float is not a reasonable alternative, as discussed in Finding 5.

The Department finds that the applicants have not avoided and minimized coastal wetland impacts, particularly the impacts to Significant Wildlife Habitat discussed below, to the greatest extent practicable, and have not demonstrated that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.

5. HABITAT:

An applicant must demonstrate that the proposed activity would not unreasonably harm listed habitats or fisheries, including significant wildlife habitat or aquatic or adjacent upland habitat.

The DMR stated that the proposed project should not cause any significant adverse impact to marine resources, traditional fishing, navigation, riparian access, or recreation. DMR stated the elimination of the existing post-supported access platform over the area of salt marsh would be beneficial. The use of float stops to keep the floats elevated off the mudflat at low tide would also be beneficial in preventing compaction of fine sediments and benthic infauna and loss of sediments through hydraulic pumping from the floats rising and falling in the water column.

The Maine Department of Inland Fisheries and Wildlife (MDIFW) reviewed the proposed project and stated the project site contains a high value Tidal Waterfowl and Wading Bird Habitat (TWWH) and a Shorebird Feeding Habitat. TWWH and Shorebird Feeding Habitats are regulated as Significant Wildlife Habitats under the NRPA. MDIFW states the proposed structure would extend more than 200 feet across the Significant Wildlife Habitats, bisecting the primary shorebird and waterfowl feeding areas at low tide during the boating season, and significantly intruding into the Significant Wildlife Habitat during the winter months when the area is primarily used by wintering waterfowl. MDIFW typically recommends denial of permanent structures in high value Significant Wildlife Habitats where no permanent structures exist, or where the proposed structure extends significantly further into the resource than existing permanent structures. This recommendation is based on documented avoidance behaviors of several priority species utilizing Significant Wildlife Habitats. Any permanent structure within this cove has the potential to impact wintering waterfowl use that MDIFW has documented as significant since 1983.

EXHIBIT – 6

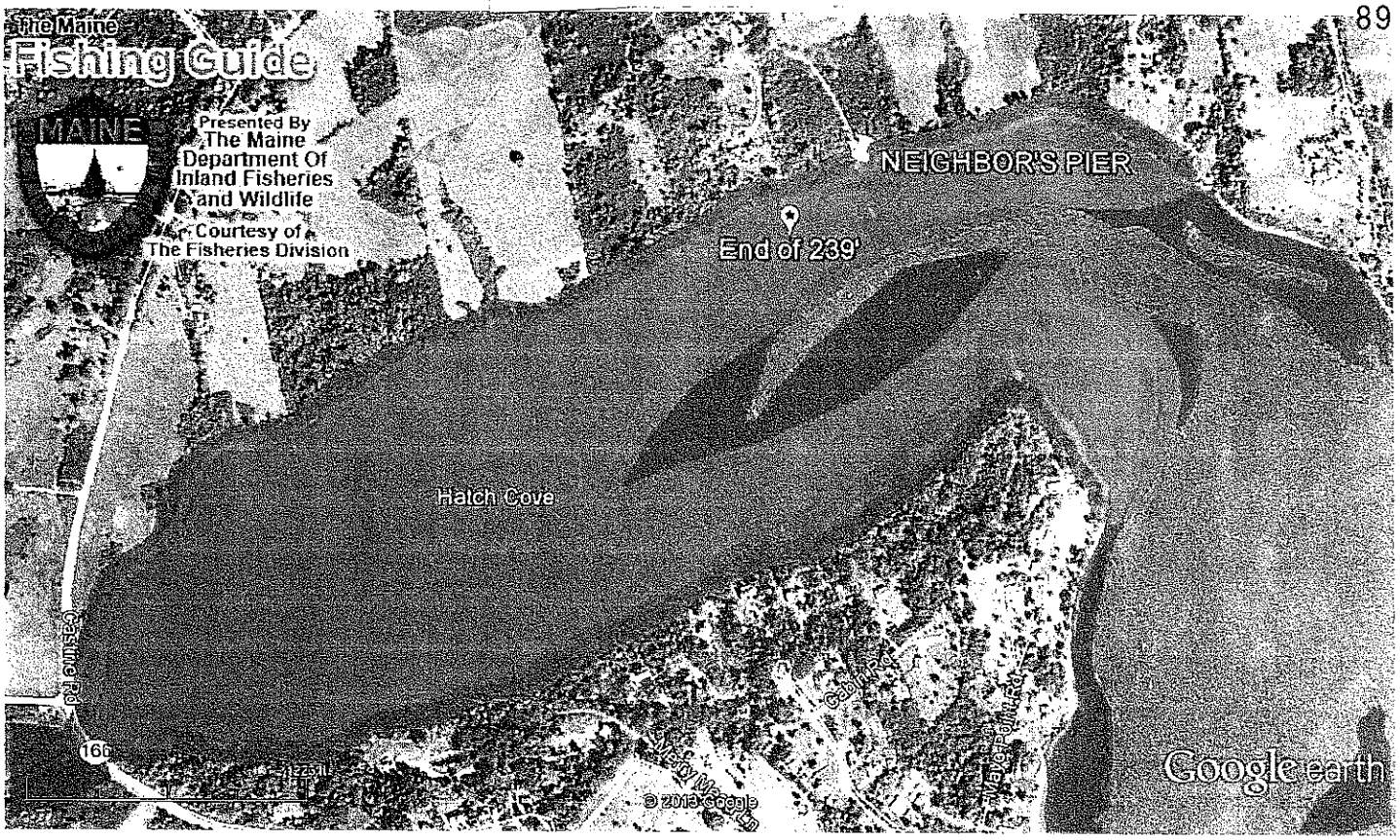

EXHIBIT – 5